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July 24, 2019

Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992 (MB Docket No. 05-311)*

Dear Secretary Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, I submit this *ex parte* letter on behalf of the City of Eugene, Oregon, to respond to certain portions of the *Draft Third Report and Order* in MB Docket No. 05-311 regarding "Preemption of Other Conflicting State and Local Regulations."[1] This will supplement the City's several previous filings in this docket.

Part III.C of the *Draft Third Report and Order* would preempt: [2]

> (1) any imposition of fees on a franchised cable operator that exceeds the formula set forth in section 622(b) of the Act and the rulings we adopt today, whether styled as a "franchise" fee, "right-of-access" fee, or a fee on non-cable (*e.g.*, telecommunications or broadband) services, and (2) any requirement that a cable operator with a Title VI franchise secure an additional franchise or other authorization to provide non-cable services via its cable system.

[1] *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, FCC-CIRC1908-08, ¶¶ 82-110 (July 11, 2019), https://docs.fcc.gov/public/attachments/DOC-358439A1.pdf ("*Draft Third Report and Order*").
[2] *Draft Third Report and Order*, ¶ 82.

It cites to Section 636(c) of the Communications Act of 1934, as amended (the "Act"), as the source of the Commission's authority to do so. This is a dramatic and unexplained departure from the mixed-use rule proposed in the Commission's Second Further Notice of Proposed Rulemaking ("*Second FNPRM*").[3] There are significant procedural and substantive flaws in the "mixed-use" portions of the *Draft Third Report and Order*, and the record does not support the preemption ruling contained in the draft.

1. The *Draft Third Report and Order* is not a logical outgrowth of the *Second FNPRM*.

The *Second FNPRM*'s mixed-use network proposal was quite specific: "we propose to prohibit LFAs from *using their video franchising authority* to regulate most non-cable services offered over cable systems by incumbent cable operators."[4] The *Second FNPRM* began by explaining that it would address "two issues raised by the remand from the United States Court of Appeals for the Sixth Circuit in *Montgomery County, Md. v. FCC*."[5] The first footnote of the *Second FNPRM* explains that the second of these issues was "the Commission's decision to *extend its 'mixed-use' ruling*—which prohibits LFAs from regulating the provision of services other than cable services offered over cable systems used to provide both cable services and non-cable services—to incumbent cable operators that are *not common carriers*."[6] Thus, the *Second FNPRM* did not contemplate, or provide notice to the public, that the Commission was considering preemption of state or local government actions taken in their in non-cable franchising authority capacities.

Moreover, the *Second FNPRM*'s exclusive focus on cable franchising authority is consistent with the Commission's prior orders in this proceeding. In the *First Report and Order*, the Commission issued rules interpreting Section 621(a)(1) and other relevant provisions of Title VI, stating that these rules "have preemptive effect pursuant to Section 636(c)."[7] The specific mixed-use rulings it held had preemptive effect were (1) "that LFAs' jurisdiction applies only to the provision of cable services over cable systems . . . . [And] it is unreasonable for an LFA to refuse to award a [Title VI] franchise based on issues related to [non-cable] services or [non-

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[3] *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, 33 FCC Rcd 8952, Second Further Notice of Proposed Rulemaking, FCC 18-131 (2018).

[4] *Second FRNPRM*, ¶ 25 (footnote omitted) (emphasis added). Although there are a number of more specific questions on which the *Second FNPRM* sought comment, nowhere did it seek comment on whether the Commission could or should preempt state or local government requirements based on non-Title VI sources of authority.

[5] *Id.*, ¶ 1.

[6] *Id.*, ¶ 1 n.1 (emphasis added).

[7] *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5157, ¶129 (2007) ("*First Report and Order*"), *petition for review denied sub nom. Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

cable system] facilities,"[8] and (2) "an LFA may not use *its video franchising authority* to attempt to regulate a LEC's entire network beyond the provision of cable services."[9]

Similarly, in the mixed-use rule portion of the *Second Report and Order*[10]—which the Sixth Circuit vacated and remanded, and which the Commission specifically noticed as the issue it was considering in the *Second FNPRM*—similarly ruled that "LFAs' jurisdiction *under Title VI* over incumbents applies only to the provision of cable services over cable systems and that an LFA may not use its [Title VI] franchising authority to attempt to regulate non-cable services offered by incumbent video providers."[11]

Thus, the *Second FNPRM* provided clear notice that the change the Commission was proposing was an extension of the Commission's prior rulings regarding state and local governments' *Title VI* authority. In contrast, for the first time in this proceeding, the *Draft Third Report and Order* seeks to preempt state and local governments' *non-Title VI* authority.

In addition, while the *Draft Third Report and Order* claims for the first time that Section 636(c) gives the Commission authority to preempt non-Title VI authority in this manner, nothing in the *Second FNPRM* provided notice of this new legal theory. In the Initial Regulatory Flexibility Analysis attached to the *Second FNPRM*, Section 636 is not among the several sections of the Act listed as authorizing the proposed action.[12] The text of the *Second FNPRM* has only a single reference to Section 636. The Commission states that "[u]nder Section 624(b), LFAs 'may not . . . establish requirements for video programming or other information services,"[13] and a footnote to that sentence includes "*See also*" citations to Sections 624(a) and 636(c). The relevant portion of Section 624(b) quoted in this sentence refers specifically to "request for proposals for a franchise."[14] In this context, the logical understanding of the "*See also*" citation to the Section 636(c)'s language preempting provisions "inconsistent with this chapter" is that Section 636(c) provides a basis for preempting *franchise requirements* regarding video programming or other information services. This understanding is consistent with the Commission's prior mixed-use rulings in this docket, which was what the Commission indicated it was seeking to extend in the *Second FNPRM*.

Under the Administrative Procedure Act ("APA"), "an [notice of proposed rulemaking] must 'provide sufficient factual detail and rationale for the rule to permit interested parties to

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[8] *Id.*, ¶ 121.
[9] *Id.*, ¶ 122 (emphasis added).
[10] As the *Second FNPRM* notes, the mixed-use portion of the *Second Report and Order* was not modified in the Commission's *Order on Reconsideration*. *Second FNPRM*, ¶ 12.
[11] *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 22 FCC Rcd 19633, ¶ 17 (2007) ("*Second Report and Order*") (emphasis added) (citation omitted).
[12] *Second FNPRM*, App'x A, ¶ 7.
[13] *Second FNPRM*, ¶ 27 (quoting 47 U.S.C. § 544(b)(1)).
[14] 47 U.S.C. § 544(b)(1).

comment meaningfully.'"[15] Any final order following a proposed rule must be a "logical outgrowth" of the notice provided, and the logical outgrowth test is satisfied if the notice "expressly ask[s] for comments on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change."[16] The *Second FNPRM* does neither, rendering the *Draft Third Report and Order* fatally flawed. While there are strong substantive legal and policy reasons why the Commission should not adopt the new mixed-use preemption ruling set forth in the *Draft Third Report and Order*, at a minimum the Commission must first provide a new notice that it is considering that option in order to comply with the APA.

2. The *Draft Third Report and Order's* preemption analysis is substantively flawed.

There are equally serious substantive flaws with the *Draft Third Report and Order*'s expansive application of Section 636(c), which is perhaps not surprising given the lack of notice and scant development of this issue in the record. In addition to the flaws pointed out in previous filings, we note the following:

First, the draft fails to include any meaningful discussion of the savings clause within Section 636. Section 636(a) provides that "[n]othing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of [Title VI]."[17] The *Draft Third Report and Order* (¶ 106) recognizes the existence of this savings clause, but summarily asserts that "states and localities may not exercise [non-Title VI] authority in a manner that conflicts with federal law." Yet that merely assumes the answer to the question: that non-Title VI-based requirements, such as nondiscriminatory and competitively neutral right-of-way fees, conflict with federal law. As explained in prior filings, they do not.[18] And the *Draft Third Report and Order* does not address at all the fact that Section 253(c) of the Telecommunications Act of 1996 specifically protects state and local governments' authority to receive "fair and reasonable compensation," on a "competitively neutral and non-discriminatory basis," for telecommunications providers' use of state and local right-of-way.[19]

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[15] *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 700 (D.C. Cir. 2016) (quoting *Honeywell Int'l, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004) (internal quotation marks omitted)), *reh'g denied en banc*, 855 F.3d 381 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 475 (2018).

[16] *Id.* (quoting *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009)) (internal quotation marks omitted).

[17] 47 U.S.C. § 556(a).

[18] *See, e.g.*, Reply Comments of the Alliance for Communications Democracy et al. at 19-23 (Dec. 14, 2018) ("CAPA et al. Reply Comments"); Letter from Tillman L. Lay, Counsel for the City of Eugene, to Marlene H. Dortch, Secretary, FCC (Sept. 19, 2018) ("Letter from City of Eugene to Marlene H. Dortch"); Comments of Anne Arundel County, MD et al. at 34-44 (Nov. 14, 2018) ("Anne Arundel County et al. Comments"); Reply Comments of Anne Arundel County, MD et al. at 19-28 (Dec. 14, 2018) ("Anne Arundel County et al. Reply Comments"); Comments of the National Association of Telecommunications Officers and Advisors et al. at 13-24 (Nov. 14, 2018) ("NATOA et al. Comments"); Reply Comments of the National Association of Telecommunications Officers and Advisors et al. at 8-17 (Dec. 14, 2018) ("NATOA et al. Reply Comments"); Comments of the City of New York at 10-14 (Nov. 14, 2018) ("NYC Comments").

[19] 47 U.S.C. § 253(c).

Nor does the *Draft Third Report and Order* even recognize, much less attempt to explain, its reversal of position from the *Second Report and Order*, 22 FCC Rcd at 19638 n.31, where the Commission made clear that its mixed-use rule "does *not* apply to non-cable franchise fee requirements, such as any lawful fees related to the provision of telecommunications services." (emphasis added).

Second, the *Draft Third Report and Order* (¶ 73) points to the 1984 Act's legislative history as "reflecting Congress's intent to preserve the then-*status quo* regarding the ability of federal, state, and local authorities to regulate non-cable services provided via cable systems." Yet the draft ignores the implications of that conclusion: under both state and local law, local right-of-way franchising authority over entities using the rights-of-way to provide non-cable services, and to charge fees for that use, existed long before the Cable Act. *See*, *e.g.*, *City of Dallas v. FCC*, 165 F.3d 341, 348 (5th Cir. 1999) (recognizing that local authority to franchise right-of-way use is independent of, and does not grow out of, the Cable Act). Thus, Congress's intent to preserve the pre-Cable Act *status quo* regarding the ability of local government to regulate and impose fees for use of the right-of-way to provide non-cable services supports Eugene's position, not that set forth in the *Draft Third Report and Order*.

Third, the *Draft Third Report and Order*'s heavy reliance (¶¶ 75-78) on Section 624(b)(1) and (2) (47 U.S.C. § 544(b)(1), (2)) as justification for its conclusion that LFAs "may not lawfully impose fees for the provision of information services . . . via [a] cable system" (¶¶ 76, 78) is misplaced. Indeed, Section 624(b)'s plain language contradicts the *Draft Third Report and Order*'s conclusion. On its face, Section 624(b)(1) treats "video programming"—an unquestioned subspecies of "cable service"[20]—just as it does "other information services." Thus, Section 624(b)(1) restricts LFA authority over "information service" no less, but crucially, also no more, than it does with respect to cable service. Put a little differently (and assuming that "other information services" are not themselves also a "cable service"), Section 624(b)(1), as well as Section 624(b)(2), do not draw the line between LFA authority over cable service and non-cable service that the *Draft Third Report and Order* claims they do.

Fourth, the *Draft Third Report and Order* (¶ 104) makes clear that the preemption ruling is driven by a desire to encourage broadband deployment. Indeed, it cites to Section 706 of the Telecommunications Act in explaining how its preemption ruling would advance federal policies.[21] But, as the Commission acknowledged in the *Second FNPRM*, "in the *Restoring Internet Freedom Order*, the Commission found that 'the directives to the Commission in section 706(a) and (b) of the 1996 Act to promote deployment of advanced telecommunications capability are better interpreted as hortatory, and not as grants of regulatory authority.'"[22]

[20] *See* 47 U.S.C. § 522(6)(A)(i).
[21] *Id.* ¶ 104 n.360 (citing 47 U.S.C. § 1302).
[22] *Second FNPRM*, ¶31 n.146 (citing *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 470, ¶ 268 (2018)).

Fifth, the *Draft Third Report and Order*'s preemption analysis suffers the same flaws as its preemption analysis in the *Restoring Internet Freedom Order*.[23] The Commission has classified broadband as an information service, which the Commission has disclaimed authority to regulate. Having done so, it cannot, as the *Third Report and Order* seeks to do, preempt local governments' authority to regulate these services in nondiscriminatory, competitively neutral manners.

Sixth, the *Draft Third Report and Order* wrongly relies on a statement from the Senate Report accompanying the 1996 amendment to Section 622 to argue that Congress intended to prevent state and local governments from imposing fees on non-cable services.[24] The quoted portion of that Senate Report was discussing Section 201(b) of the Senate bill,[25] but the Conference Report adopted the House version of that provision.[26] Although the Conference Report's description of the House version contains language similar to what the *Draft Third Report and Order* quotes from the Senate Report, both of those sentences reference only the reach of the Cable Act's "franchise fee provision"[27]—not state and local governments' non-Cable Act authority. And in case there is any doubt about that, immediately after the passage summarizing the House version of the Section 622(b) amendment, the Conference Report goes on to state: "[t]he conferees intend that, to the extent permissible under State and local law, telecommunications services, *including those provided by a cable company*, shall be *subject to the authority of a local government* to, in a non-discriminatory and competitively neutral way, *manage its public rights-of-way and charge fair and reasonable fees*."[28] Thus, the legislative history unambiguously demonstrates Congress's intent to preserve, not preempt, local governments' authority to assess right-of-way fees on cable operators' non-cable services in a nondiscriminatory, competitively neutral manner. The *Draft Third Report and Order*'s suggestion otherwise is flatly incorrect.

3. The record does not support the factual claims in the *Draft Third Report and Order*.

The *Draft Third Report and Order* rests on findings that cable operators' investment in broadband infrastructure "likely would be higher absent such requirements," "that the imposition of duplicative requirements may deter investment in new infrastructure and services irrespective of whether or to what extent a cable operator passes on those costs to consumers," and that "such requirements impede Congress's goal to accelerate deployment of 'advanced telecommunications capability to all Americans.'"[29]

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[23] *See* Comments of Public Knowledge (Nov. 14, 2018).
[24] *Draft Third Report and Order*, ¶ 95 (quoting S. Rep. No. 104-23, at 36 (1996)).
[25] S. Rep. No. 104-23, at 36.
[26] *See* H.R. Rep. No. 104-458, at 180 (1996) (Conf. Rep.).
[27] S. Rep. 104-23, at 36; H.R. Rep. No. 104-458, at 180.
[28] H.R. Rep. No. 104-458, at 180 (emphasis added).
[29] *Draft Third Report and Order*, ¶ 104 (quoting 47 U.S.C. § 1302) (citations omitted).

Eugene is disappointed that the draft uncritically adopts the dubious claims of industry commenters, ignoring substantial legal and factual arguments submitted by Eugene and other local government and PEG commenters refuting these claims. To ensure that the record contains a comprehensive rebuttal of the arguments presented by industry commenters, the following are attached to this letter:

- **Attachment 1:** The Comments of the Cities of San Antonio, Texas; Eugene, Oregon; Bowie, Maryland; Huntsville, Alabama; and Knoxville, Tennessee ("Eugene City Coalition") in *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Development*, WT Docket No. 17-79 (June 15, 2017) ("*Wireless Barriers*").

- **Attachment 2:** Eugene City Coalition Comments in *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (June 15, 2017) ("*Wireline Barriers*"). This Attachment includes the following exhibits:

    - **Exhibit A:** Eugene City Coalition Comments in *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies*; *Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421 (March 8, 2017) ("*Mobilitie Petition*").

    - **Exhibit B:** Reply Comments of the Eugene City Coalition in *Mobilitie Petition* (April 7, 2017).

    - **Exhibit C:** Comments of the City of San Antonio in *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59 ("*Acceleration of Broadband Deployment*") (July 18, 2011).

    - **Exhibit D:** Comments of the City of Eugene, *Acceleration of Broadband Deployment* (July 18, 2011).

    - **Exhibit E:** Reply Comments of the City of San Antonio, *Acceleration of Broadband Deployment* (Sept. 30, 2011).

- **Attachment 3:** Reply Comments of the City of Eugene, *Acceleration of Broadband Deployment* (Sept. 30, 2011).

Among other things, these filings show, based on facts, including the FCC's own data, that Eugene's seven percent right-of-way fee—which is specifically identified and criticized in the *Draft Third Report and Order* as an example of the type of local fee requirement the Commission would preempt—is clearly not a barrier to broadband deployment or subscribership. Indeed, Eugene has become one of the nation's leading high-tech and broadband communities,

thereby further disproving the *Draft Third Report and Order*'s assumptions about the effect of City's right-of-way fee.[30]

For the procedural, substantive, and factual reasons set forth above, and in prior filings in this docket, the Commission should not adopt the "Mixed-Use Rule" and "Preemption of Other Conflicting State and Local Regulation" sections of the *Draft Third Report and Order* in any final order issued in this proceeding.

Respectfully submitted,

/s/ Tillman L. Lay

Tillman L. Lay

Counsel for City of Eugene, Oregon

Attachments

[30] *See, e.g.*, Andrew L. Wang, *Best Cities for Quality of Life*, NerdWallet (Oct. 16, 2017) https://www.nerdwallet.com/blog/credit-cards/best-cities-for-quality-of-life/ (Eugene named a top ten city by quality of life.); City of Eugene, *Eugene Awarded $1.9 Million Grant for High Speed Fiber* (May 23, 2017) https://www.eugene-or.gov/CivicAlerts.aspx?AID=3002&ARC=6419 (Eugene Receives $1.9 Million in Fiber Optic Network Funding from US Department of Commerce, May 2017.); Jared Lindzon, *The Next Top 10 Cities For Tech Jobs*, Fast Company (July 13, 2015) https://www.fastcompany.com/3048391/the-next-top-10-cities-for-tech-jobs (Eugene named a Top Ten Recruitment City for Tech Jobs, 2015.); Sherri Buri McDonald, *Youth Tech Program Enters Second Season*, The Register-Guard (Sept. 25, 2015) https://www.registerguard.com/article/20150925/BUSINESS/309259986 (describing an award-winning, free computer programming training project for elementary and secondary students, which began as a pilot project of Lane Community College, the City of Eugene, and the Eugene School District); Sherri Buri McDonald, *Eugene, Ore., Named 'Gigabit City' by Nonprofit Mozilla Foundation*, Government Technology (Mar. 17, 2017) Eugene, Ore., Named 'Gigabit City' by Nonprofit Mozilla Foundation; Laura Hamilton, *Mozilla, NSF, and U.S. Ignite Reveal $300K in Grants for Gig-Based Projects in Oregon and Louisiana*, ECN Magazine (March 14, 2017) https://www.ecnmag.com/news/2017/03/mozilla-nsf-and-us-ignite-reveal-300k-grants-gig-based-projects-oregon-and-louisiana; Sophia McDonald Bennett, *Eugene's Tech Connection*, Open for Business (Oct./Nov. 2016).